

DETAILED ACTION

1. Claims 12 and 17-20 are rejected under 35 U.S.C. 102(b) as being anticipated by Emarkaryan (3,060,033) or The Joy of Soup: Rose Petal Recipes (claim 12 only).

2. *Claim Rejections - 35 USC § 103*

3. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

4. Claims 1-12, 17-20 are rejected under 35 U.S.C. 103(a) as being unpatentable over Emarkaryan (3,060,033) in view of Francis (Francis, F. J. 1999. Wiley Encyclopedia of Food Science and Technology. 2nd Edition. Volumes 1-4. pp. 2305-2321. John Wiley & Sons) and further in view of The Joy of Soup: Rose petal Recipes (claim 12 only).

5. For purposes of the prior art rejections, any method of cultivation will be considered to meet the limitations of claims 1-3 to particular methods of cultivation.

6. Emarkaryan teaches a method for preparing an edible sugary composition comprising harvesting fresh floral material and combining the material with sugar (col. 1, lines 30-35). The sugar and rose mixture may then be combined with water to form a sugary syrup comprising the floral material (Example IV). Claim 1 differs from the reference in the step of pasteurizing the aqueous solution at particular t Claims 12 and 17-20 are product-by-process claims. Patentability does not depend on method

Art Unit: 1781

of production, rather the product made. The different method of making does not make the product patentable over the prior art.

7. Emarkaryan teaches a sugary solution containing floral material. This sugary solution is further combined with other ingredients to produce confectionary products including jams, jellies, and Turkish delight (col. 3 lines 15-26).

8. The recipe to Rose Petal Syrup contains rose petals, water and sugar to make a syrup as in claim 12.

However, Joy of Soup discloses a Rose Petal syrup made from rose petals, water and sugar in which the rose petals are simmered in water for an hour, and the syrup is strained through a fine sieve, then boiled and put in hot sterilized bottles (Rose Petal Syrup). Certainly, heating temperatures vary according to the degree of sterilization required and in how processed the product should be. It would have been within the skill of the ordinary worker to determine what temperatures to use to process a product as it is easy to determine how each temperature affects the product. The reference to Rose Petal syrup discloses straining out the rose petals. However, if one wanted to have a decorative product, it would have been within the skill of the ordinary worker to leave the petals in. Just as in making a jam or jelly, there is a choice to leave the seeds in the product, but nothing unobvious results. In this case, there are no coactions of ingredients to make a new product. The product is made of flowers, sugar and water. Pasteurized syrups are well known as in maple syrup, or corn syrup which are produced in mass and must have a particular shelf life. Attention is invited to *In re Levin*, 84

Art Unit: 1781

USPQ 232 and the cases cited therein, which are considered in point in the fact situation of the instant case, and wherein the Court stated on page 234 as follows:

This court has taken the position that new recipes or formulas for cooking food which involve the addition or elimination of common ingredients, or for treating them in ways which differ from the former practice, do not amount to invention, merely because it is not disclosed that, in the constantly developing art of preparing food, no one else ever did the particular thing upon which the applicant asserts his right to a patent. In all such cases, there is nothing patentable unless the applicant by a proper showing further establishes a coaction or cooperative relationship between the selected ingredients which produces a new, unexpected, and useful function. In re Benjamin D. White, 17 C.C.P.A (Patents) 956, 39 F.2d 974, 5 USPQ 267; In re Mason et al., 33 C.C.P.A. (Patents) 1144, 156 F.2d 189, 70 USPQ 221. (Underlining added). In this case no coaction of ingredients is seen to make a new, and unexpected product because applicant is basically adding rose petals to syrup, and both are known ingredients. Therefore, it would have been obvious to one of ordinary skill in the art to further fragment flowers if one wanted flowers in the solution, and to pasteurize or heat at various temperatures according to the end use of the product.

9. Regarding claims 4-6, Ermarkaryan teaches the flowers are to be harvested when the flowers are in full blossom. The old and wilted petals are not to be used (col. 1 lines 69-72). The flowers of Ermarkaryan are harvested in late May and early June (late spring) (col. 2 lines 1-2). From these teachings, one of ordinary skill would

Art Unit: 1781

have found it obvious to discard the petals that first unfolded as these would be the oldest petals on the flower.

10. Regarding claims 8 and 11, Ermarkaryan states that his rose flavoring may be used in combination with food preservatives and other flavoring agents (col. 3 lines 24-25).

11. Ermarkaryan is silent as to a method for pasteurizing a solution comprising a sugary syrup and floral matter.

12. Francis teaches pasteurization of liquids where the temperature is raised to the desired temperature, held for the necessary length of time, and then quickly cooled to the desired temperature (p. 2306 col. 1). Table 1 (p. 2306) shows typical processing conditions for a variety of foodstuffs. Specific pasteurization conditions may vary widely within known ranges depending on the operator and the material to be pasteurized.

13. One of ordinary skill in the art at the time the invention was made wishing to provide microbial stability to the sugar solution would have found it obvious to pasteurize the solution, as pasteurization is a well-known technology in the art as is shown by the teachings of Francis. One of ordinary skill in the art at the time the invention was made would have been able, through no more than routine experimentation, to determine the appropriate heating and cooling temperatures and times as claimed for the pasteurization of a sugary syrup. Francis teaches that the pasteurization conditions may vary widely depending on the operator and the material to be pasteurized (p. 2306). As pasteurization is a well known and widely used

Art Unit: 1781

process for imparting microbial stability to foodstuffs, one of ordinary skill would have expected the sugary syrup to maintain the favorable organoleptic properties provided by the addition of floral material while at the same time posses the desired microbiological stability. Therefore, it would have been obvious to use whatever temperature which would have kept the rose petals from deteriorating and making the product unattractive and not marketable.

14. Applicant's claim to combining the floral material with a sugar solution are considered to be obvious over the teachings of Ermarkaryan where the rose petals are first combined with sugar, then combined with water to form a sugary solution. Applicant's order of performing the mixing steps results in the same sugary syrup composition comprising floral material as the teachings of Ermarkaryan. As there are no unexpected results obtain, the change in order of the steps is considered to be obvious.

ARGUMENTS

Applicant's arguments filed 4-18-10 have been fully considered but they are not persuasive. Applicant argues that Ermarkaryan is to a food additive containing rose petals and sugar, and using a process that does not heat to a particular temperature with rapid cooling for a particular time, with the petals intact. However, as part of the patent cited by the examiner, was to making jam or jelly and just as applicant is doing, rose petals with sugar is added to water and heated to boiling, this makes a syrup, and just as applicant is doing, this syrup can be used to make jam or jelly product (col. 3, lines 15-25, lines 30-41). In addition, claim 17 is a product claim, where the process

Art Unit: 1781

limitations are not given weight unless there is a showing that the process limitations make an unobvious product over the primary reference. However, the 102b will be removed and the claims incorporated into the 103 rejection.

Heating has been disclosed as in the art rejection.

Nothing new or unobvious is seen in using whole or fragmented pieces of petals even if this releases the aromatic compounds. In Eremarkaryan, treating petals with sugar would have drawn out any juices containing aromatic compounds so that no difference in the product is seen because of fragmenting the petals. Just the fact that this has not been done does not mean fragmenting petals is patentable as in *In re Levin*, supra. No new or unobvious outcome is found from this process.

Even though Eremarkaryan uses one type of rose, the secondary reference to Rose Petals, uses roses in general, and it would have been obvious to substitute such petals for the petals of Eremarkaryan because they both have the rose smell.

Applicant argues as in part 6 that Eremarkaryan uses higher temperatures. However, the reference to Rose Petals uses simmering temperatures. Applicant is arguing a dry mixture of rose petals and sugar, which section was not cited by the Examiner just as the further argument as to heating is to the wrong passage.

Applicants have not excluded making a jam from the claims.

The process of Eremarkaryan is to mixing the rose petals with sugar, putting in a can, then water is added and heated to 50C, and heated to boiling (col. 2, lines 61-68, col. 3, lines 30-45). Certainly, pasteurization temperatures are well know, and within the skill of the ordinary worker to achieve and use for their known function. If one does not

Art Unit: 1781

want a rose jam, and only a sugar syrup, this only entails stopping the process at pasteurization temperatures with no new or unobvious result. One can visually see the effects of various temperatures on the rose petals and vary them to achieve a syrup.

Joy of Soup discloses a Rose Petal syrup made from rose petals, water and sugar in which the rose petals are simmered in water for an hour, and the syrup is strained through a fine sieve, then boiled and put in hot sterilized bottles (Rose Petal Syrup). Even though Joy of Soup goes on to strain the syrup to remove the petals, it would have been within the skill of the ordinary to leave the petals in or not as nothing new or unobvious comes from either process. Boiling or heat treating the petals has been discussed above.

15. The effect of highly sugar syrup compositions is well-known since bacteria do not grow in high sugar conditions, especially those that have been pasteurized. As the conditions to remove bacterial growth are degree of acidity, heat, and high concentrations of sugars or salts, the use of heat and high concentrations is a double process of removing bacterial growth, and all the above processes of heat, acidity and sugar concentrations are well known, as seen in any canning book. Often two types of processes for reducing microbes are used because the product is delicate, such as in the use of pickles, strawberries and other fragile foods.

16. The same remarks as above apply to Francis. As above, the pasteurization profile is not seen to have been unique, because of course, aromatic compounds are affected by heat as is the appearance of the fragmented floral material. This is the

Art Unit: 1781

reason why low heat and gentle process conditions are used in treating fragile materials.

Conclusion

THIS ACTION IS MADE FINAL. Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Helen Pratt whose telephone number is (571) 272-1404. The examiner can normally be reached on Monday-Friday 9:30-6:00 EST .

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Keith Hendricks can be reached on (571) 272-1401. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Art Unit: 1781

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/Helen F. Pratt/
Primary Examiner, Art Unit 1794

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